IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

DAVID WAYNE JOHNSON,

Petitioner, No. CIV S-04-1236 MCE JFM P

vs.

J. WOODFORD, et al.,

Respondents. FINDINGS & RECOMMENDATIONS

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Petitioner is a state prisoner proceeding pro se with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner is serving a sentence of twenty-seven years to life in prison following his 1983 conviction on charges of first degree murder with use of a firearm. Petitioner claims that his constitutional rights have been violated by the failure of the California Board of Prison Terms (BPT) to set a "primary term" and a "maximum release date" for him.

BACKGROUND

Petitioner is serving a sentence of twenty-seven years to life in prison as a result of his 1983 conviction in state court on the charge of first degree murder with use of a firearm. Ex. A to Answer to Petition for Writ of Habeas Corpus, filed Nov. 8, 2004, at 3. Petitioner's initial parole consideration hearing was held on December 1, 1999. Id. at 10. At that hearing,

petitioner was denied parole for three years. Id. During the period following that hearing, petitioner was found guilty of four prison rules violation reports, and he received two CDC-128A's for "Conduct and Disobeying a Direct Order." Id. at 11.

Petitioner's second parole consideration hearing was scheduled for March 12, 2003. At that time, petitioner signed a waiver of hearing and stipulated to a finding of unsuitability based on his "recent disciplinary issues." Id. at 21. Petitioner requested that a base term be set for his sentence. Id. The request for a base term was denied. Id. at 22.

ANALYSIS

I. Standards of Review Applicable to Habeas Corpus Claims

Federal habeas corpus relief is not available for any claim decided on the merits in state court proceedings unless the state court's adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Under section 2254(d)(1), a state court decision is "contrary to" clearly established United States Supreme Court precedents if it applies a rule that contradicts the governing law set forth in Supreme Court cases, or if it confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at different result. Early v. Packer, 537 U.S. 3, 7 (2002) (citing Williams v. Taylor, 529 U.S. 362, 405-406 (2000)).

Under the "unreasonable application" clause of section 2254(d)(1), a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from the Supreme Court's decisions, but unreasonably applies that principle to the facts of the prisoner's case. Williams, 529 U.S. at 413. A federal habeas court "may not issue the writ

simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 412; see also Lockyer v. Andrade, 538 U.S. 63, 123 S.Ct. 1166, 1175 (2003) (it is "not enough that a federal habeas court, in its independent review of the legal question, is left with a 'firm conviction' that the state court was 'erroneous.'")

The court looks to the last reasoned state court decision as the basis for the state court judgment. Avila v. Galaza, 297 F.3d 911, 918 (9th Cir. 2002). Where the state court reaches a decision on the merits but provides no reasoning to support its conclusion, a federal habeas court independently reviews the record to determine whether habeas corpus relief is available under section 2254(d). Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir. 2000).

II. Petitioner's Claim

Petitioner claims that the BPT's denial of his request to set a base term before he is found suitable for parole violated his federal constitutional right to due process of law.[1] Petitioner's claim was rejected by the state courts in orders denying petitions for writ of habeas corpus at each level of the state court system. See Ex. B to Answer. The state court of appeals and the state supreme court summarily denied the petitions, while the superior court held that petitioner had "failed to prove sufficient grounds for relief." Id.

"California prisoners have a liberty interest in parole." Hayward v. Marshall, 512 F.3d 536, 542 (9th Cir. 2008) (citing Sass v. California Board of Prison Terms, 461 F.3d 1123, 1127 (9th Cir. 2006)). The liberty interest "arises as a result of California Penal Code § 3041(b), which provides that, at a parole consideration hearing, the Board '*shall* set a release date unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity

[1] Petitioner also contends that his March 12, 2003 waiver of a parole consideration hearing was signed "under duress." Petition, filed June 28, 2004, at 8. This contention does not appear to be the basis for a separate claim for relief; the gravamen of petitioner's claim is that he was entitled to have a base term set before his suitability for parole is considered. He seeks a new hearing after a base term and a maximum release date have been set. Id. at 54.

of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration.' Cal. Penal Code § 3041(b)." Id.

Because "parole-related decisions are not part of the criminal prosecution, the full panoply of rights due a defendant in such a proceeding is not constitutionally mandated." Jancsek v. Oregon Bd. of Parole, 833 F.2d 1389, 1390 (9th Cir. 1987) (internal quotations and citation omitted). Where, as here, parole statutes give rise to a protected liberty interest, due process is satisfied in the context of a hearing to set a parole date where a prisoner is afforded notice of the hearing, an opportunity to be heard and, if parole is denied, a statement of the reasons for the denial. Id. at 1390 (quoting Greenholtz, 442 U.S. at 16). See also Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (describing the procedural process due in cases involving parole issues). Violation of state mandated procedures will constitute a due process violation only if the violation causes a fundamentally unfair result. Estelle, 502 U.S. at 65.

Petitioner's claim that the BPT is required to set a base term for his sentence before it makes a determination regarding his suitability for parole is a question of state law. As a general rule, federal habeas corpus relief is "unavailable for alleged error in the interpretation or application of state law." Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985), at 1085. Petitioner's claim is not, therefore, cognizable in this federal habeas corpus action unless the failure to set a base term prior to making a suitability determination is "fundamentally unfair." Estelle, supra.

In In re Dannenberg, 34 Cal.4th 1061 (2005), the California Supreme Court rejected the argument that the BPT is required by the provisions of California's parole statute, California Penal Code § 3041, to set a base term for an individual serving an indeterminate life sentence before determining that the individual is suitable for parole. See id. at 1078-1095. The liberty interest protected by the federal due process clause is not infringed by the practice of setting a base term if and when an inmate is found suitable for parole. The state courts' rejection

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of petitioner's claim is neither contrary to nor an unreasonable application of applicable principles of clearly established federal law.

Accordingly, for the foregoing reasons, IT IS HEREBY RECOMMENDED that petitioner's application for a writ of habeas corpus be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: February 19, 2008.

UNITED STATES MAGISTRATE JUDGE

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